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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOE L. ROBINSON,
PETITIONER

versus

BUICK/FLINT; LOCAL 696 UAW
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI

JOE L. ROBINSON
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QUESTIONS PRESENTED

I. Did the U.S. Court of Appeals affirm the decision of the District Court for the Southern District of Ohio violate the 14th Amendment principles as described in Swain v. Ala. 380 U.S. 233; Norris v. Ala., 294 U.S. 587 and in the face of Hernanez v. Texas, 347 U.S. at 480 275 Ala. 508, 515, 156 So. 2d 368 375,; Strouder v. West Va., 100 U. S. 303 when:

1. Before the jury trial Defendant had knowledge to continuance of trial before Plaintiff . When presented with sworn statement did not deny it.

2. If Plaintiff had complaint concerning the all white jury, case would have been postpone or dismissed. Important testimonies of racial discrimination would have not surface.

3. Whether the guarantee of a fair trial by District Court to Plaintiff was kept after witnesses testimonies.whether it constitutes racial discrimination.

4. When the Defendant acknowledge the picking of an all white jury from an all white area in his brief, whether a new trial should have been granted.

Questioned Presented Continued

II. Whether or not the U.S. Sixth Circuit Court of Appeals affirm the Decision of the District Court for the Southern District of Ohio violates the First Amendment, right to protest or petition government for redress also the Fourteenth Amendment and the equal protection clause of enforcing or making contracts in discrimination/retialiation discrimination; Winston v. Lear-Sigler, 558 F .2d 1266 (6th Cir. 1978); Stetson v. Novack Investment Co, 638 F 2d 1137 (8th Cir-81) and conspired, Flagg Bros v Brooks, 436 U.S. 140, 155 1978; U.S. v. Price, et al, 383 U.S. 787 (1966).

1. Whether Federal Rule 11 and 56 (g) had been violated when the Defendant produce false documents and bad faith affivadits all grievances had been settled.

2. The Defendant can be held liable under 1866 C.R.A. and Title VII of 1964 C.R.A. for refusing to process grievances for black employees, charging employer with collective bargaining agreements ban on racial discrimination.

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OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is reported at Robinson v. Quick/Peck 88-3298; and Local 696 U.A.W. 88-3655. The opinion of the U.S. District Court for the Southern District of Ohio Western Division is reported at Robinson v. Quick/Peck case no. C-3-84-570, 1984; Robinson v. Local 696 U.A.W., Case no. C-3-86-456, 1986.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on May 15, 1989; See Robinson v. Quick/Peck;Local 696 UAW (Ohio 1989) Appendix "A". This petition for certiorari to the Supreme Court is filed within sixty (60) days of the Judgment below.

The statutes under which the appeal to this court is 28 usc 1254, 28 USC 1254 (1

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution provides;

> Congress shall make no law abridging the freedom of speech or the right of the people to petition the Government for a redress of grievances.

The Seventh Amendment to the Constitution provides in pertinent parts;

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

The Fourteeneth Amendment of the Constitution provides in pertinent parts'

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State .....no state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(Robinson v. Quick/Peck)

Petitioner, Joe L. Robinson was an employee of Delco Moraine, General Motors Corporation (herein GMC) and a member of Local 696 UAW from July 23, 1968 until September 17, 1985, when his seniority was cancelled.

On 6-26-84, he filed a complaint for discrimination against Dave Quick/ Zola Peck in the U.S. District Court for the Southern District of Ohio, Western Division because he was treated

different than white and coded white employees. In 1974, he suffered an industrial injury with his employer, in 1983, he had two surgeries resulting from the injuries. When he returned back to work he was restricted from performing certain jobs by his doctors. However, he was placed on jobs by his supervisors against his codes. He was discipline when he could not perform the jobs. There was white people who was coded some being the same and less time than he but was not discipline or sent hom; they were given jobs within their codes or restrictions and was not harass; Eva Lewis, Gene Baker, & Homer Anderson. Petitioner was single out because of his race, black.

On June 11, 1985, Petitioner filed a motion to Amend Delco Moraine, GMC to his complaint, Title VII 704 (a) 42 USC 1981 2000 (3) (a) provides in per-

tinent parts;

It shall be unlawful employment practice for an employer to discriminate against any of his employees....because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this subchapter.

The employees protest of alleged racial discrimination does not have to have been manifest in the filing of a formal charge with any agency, to be protected, Winston v. Lear-Sigler, supra; Setser v Novack Investment Co., supra; Alexander v. Machinists Aero Lodge, 735, 565 f .2 d 1362 (6th Cir. 1977). Section 704 (a) "has been construed broadly to prohibit "discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory

conditions of employment". Petitionar was threaten by his supervisor, Dave Quick, General Foreman, who told him to give up his job to a white coded employee, Gene D. Baker, who had been working all of Petitioner overtime. Earlier, Petitioner had file a grievance through his local committeeman, Ken Hawkey on 2-18-85 for overtime pay, grievance number 164489, according to the contract between Local 696 UAW & Delco Moraine, GMC. On 2-20-85, Defendant, Dave Quick representing GMC & Ken Hawkey representing the Union signed a joint agreement that Robinson is medically coded from working the so-said- job (piston station), to stop him from getting all of his back overtime pay for about two years which was in the thousands of dollars. Dave Quick told Petitioner if he did not give up his job to Gene Baker he would not be given any overtime and would also

be fired, he further stated he had the full backing of Delco Moraine, GMC high officials including Jack Kinderdine, Supertindent.

When Petitioner filed a motion to amend Delco Moraine, GMC as a party, he stated other blacks had been discriminated against the same as himself by them. Blacks was discipline and treated with more severe punishments than whites; some of the whites are, Floyd Rickrell, alcohol abuse shooting firecracker in department, oral sex in the department; Tom Pitzinger sabotaging line, Charlie Brown stealing tools, Dixie Burgemann stealing brakes, Doral Lindsey stealing air conditioners all of these fired and rehired; about 20 people arrested and fired for subatance and drug abuse, eight rehired mostly white, Ed Wolfe, General Foreman, assault Dayton police after being caught with a known prostitute,

promoted to supertindent, William Fuller, General Foreman, on sick leave caught working some other place, congralutated no charges file, Big Red, maintenance supertindent, caught stealing components by Lieutenant (black) security, Big Red retired with honors Sutton who took pictures of the stealing was demoted to sargeant and heavily harass by the company, Roger Kendall General Foreman, (black) fired for overtime abuse, Edan Baker, General Foreman (white) was abusing overtime nothing happen, Booker T. Castleberry (black) fired for taking bets. In 1984 there was ten thousand dollars bet floating in many departments on the world series, co-sponsor byFloyd Rickrell (white) betting was being done by many white supervisors, no firing done.

During the week of July 21, 1985 and August 5, 1985, Petitioner was vacating in Texas with his family. He

sent a card to his supervisors ex. 35. On August 5, 1985, he returned to his job and was ordered to go to second shift by his General Foreman, Dave Quick, to work the piston job, this was the same job that Quick & Hawkey signed that Robinson was medically coded from working, Quick told Petitioner he was notified by his foreman Roy Schfeek on Thursday. Petitioner explain to Quick that he was in Texas, therefore no one notified him, and according to the contract, we must be notified in advance, furthermore he was the sixth highest seniority person in his department of approximately 50 and should not be sent to second shift and according to the contract high seniority prevails. Petitioner stated he had been ordered by his supervisors and union not to work the piston station job, but he would not refused to go to second shift, he requested for them to pay him all of his

overtime back to 1984, including the grievance they signed on 2-20-85 that took it away from him. Quick stated we are not giving you anything. Pettitoner requested and received his union officials, Ken Hawkey, committeeman and Joe Dowling, committeeman-at-large. Pettioner explain to them about the situation and ask Ken Hawkey to quote the seniority contract. Mr. Hawkey did and stated Petitioner had seniority to hold days, also to the signed grievance on 2-20-85, and told him he was right and did not have to go to second shift according to the contract. Joe Dowling told Petitioner to go to second shift and forget the grievance and contract. Protectioner told Dowling that he has been protecting white employees with high seniority, and he wanted the same protection and asked if he was going to get him all of his back overtime and regular pay where he was sent home daily for over a

year and had file many grievances, Mr. Dowling became hostile and angry and said no. Petitioner was discipline and sent home by Defendant Quick with encouragement from Dowling for refusing shop rule 12, obeying order of supervisors. Petitioner requested security for his safety because of arguing between himself, Dowling and Quick also to prevent accusation of stealing. Ken Hawkey, committeeman, told Petitioner to come over to the union office and file a grievance to overturn the disciplinary and shift change.

On 8-8-85, Petitioner file a grievance #B 735527/5-5000 "chg. mgt. with giving an unjust DLO for allege viol. of SR 12, for which the grievant is not guilty, he demand mgt. clear the grievant's record and pay him all monies lost due to this unfair DLO".

On 9-17-85, Petitioner seniority was cancelled, over thirty days after he

file his grievance, his seniority was cancelled.

On May 7. 1987, Judge Rice issued a ruling. Sustain in part and overrule in part; Sustain that Plaintiff should not file any more amendments without leave of court; overrule Defendant motion to strike Plaintiff supplemental complaint; overrule Plaintiff motion for summary and declaratory judgments and stricken Plaintiff Title VII claim, he stated "Plaintiff will suffer no prejudice from the striking of his Title VII complaint because the same order and allocation of prior applicable in a disparate treatment case under Title VII maybe utilized in adjudicating race discrimination claims arising under 1981. Daniels v. Board of Education of the Ravenna School Dist. 805 F .2d 203, 207 (6th Cir. 1986); Jackson v. RKO Bottles of Toledo, Inc. 743 F .2d 370, 378 (6th Cir. 1984)". When Judge Rice took out Petitioner Title VII claim, it weaken his complaint

because there was witnesses who was not allowed to testify to discrimination by Delco Moraine, however, Judge Rice stated Plaintiff woud suffer no prejudice.

Petitioner was in state court when Respondent attorney Joseph Buchanan, stated he would be out of town during the trial (2 months early) of 6-21-87, this was stated in front of witness who signed a sworn statement. When Petitioner complain to the court and ask the judge to remove himself, he rescheduled the trial for 9-23-87. The court guarantee he would get a fair trial.

On 9-23-87, trial began; the jury selection process began. There was about 50-60 people for selection with about four (4) blacks. Respondent attorney excluded two blacks that had been selected in the jury box, one black was dismissed by the court because she

had worked the same place as one of Petitioner key witness, the other black was too far down the line to be called, therefore, Petitioner was left with an all white jury. In the voir doire to the jury, he asked them if they could render a fair verdict regardless of race based upon the evidence presented, all said yes. Petitioner proceed with the all white jury because he did not want his case postpone, he needed to get the proof of discrimination on record.

Petitioner began to call his witnessess who testified to discrimination, contract violation and his medical condition. He called his three expert witnesses, Dr. Duarte, Dr. Tytko & Dr. Dawson, and cross examine Defendant witness Dr. Mobley. He called five black witnesses and one white witness who testified to discrimination and two union officials who testified to contract violation. One of the subpoena

union officals, Joe Dowling (who told Robinson to go to second shift) evaded his subpoena and did not show. Petitioner also subpoena Dorris Duff, 2nd district representative, and Johnny Spencer, president of Local 696, but the court forbid Petitioner not to talk about the union due to pending trial with them.

STATEMENT OF THE FACTS

(Part One)

Petitioner filed his complaint against two of his supervisors, Quick/ Peck and later amended his employer, Delco Moraine, GMC for discriminating against him. 42 USC 1981 and Title VII of the 1964 C.R.A. 704 (a) 2000-3-(a). The court stricken Petitioner Title VII claim and stated Plaintiff will suffer no prejudice from the striking of the Title VII because the same order and allocation of proof applicable in a disparate treatment case under Title

VII may be utilized in adjudicating race discrimination claims arising under 1981.

In Petitioner opening statement to the all white jury, he stated the Defendant discriminated against him , discrimination is when one person is treated different from another, he stated this I will prove by my witnesses testimonies and exhibits. He further stated this was a contract violation between UAW & GMC, a violation of his constitution rights which states,in peritent parts, negroes have a right to make and enforce contracts and enjoy equal protection of the laws as well as whites. In the Supreme Court Final Law Week Index vol. 55, 1986-87 Term,states Racial Discrimination 42 USC 1981, barring discrimination in making and enforcing contracts, was intended by Congress to protect identificable classes of persons subjected to intentional discrimination solely because of ancestry

or ethnic characterists.....is actionable under Act, No. 85-2169-4626.

Petitioner called his first witness, Beulah Booker, an employee of Delco Moraine for 13 years who testified to the following; she knew Plaintiff for over nine years and was his fiancee, she knew of his injuries and heavy medication he takes, seeing Quick and Plaintiff arguing constantly T.8, objective by Defendant, overrule by Court, hearing Quick complaining about sick/injuried employees, witness other foremans discipline and harrassing Plaintiff, T. 10, witness him file grievances against foremans, T. 10, to the contract we have with GMC, objected by Defendant, overrule by court, T.11, Roy Schfeek harrassing and giving him no work passes T. 11, hearing Schfeek say Quick told him to harass Plaintiff T. 14, other sick/injuried white in 536 department who was notdiscipline T. 15 objection/overrule by court,

to Gene Baker white injuried, coded, she never saw work but sitting for 2 years, objec/overrule by court T. 18, that Quick & Baker was buddies object/ overrule by court T. 19, witness Baker working Plaintiff overtime and weekends T. 20, seeing Plaintiff being sent home on weekdays and weekends, no work object/overrule by court T. 21, that Plaintiff didn't have any problem with previous general foremans object/overrule by court T. 26, Plaintiff worked his regular and all of his overtime seven days a week for 3 years object/ overrule by court T. 29, and when talking with foreman Ann Huguely, Dave Quick name would always come up object/ overrule by Court T. 32, to the frequent visiting Plaintiff department and often caught Quick and high ranking officials, Jack Kinderdine, supertin dent, arguing with him T. 39, she pointed to Zola Peck, Defendant, discipline

Plaintiff object/overrule by court T. 6, she witness Quick coming to the break area and get Plaintiff after he had made out, harassing and calling him a no-goodblack- son-of-a-bitch object/ overruled by court T 9,11. In cross exam of Booker the Defendant prove it was a make-out system and Plaintiff had made-out T.100,106. He re-established that Zola Peck, Quick argued a lot with Plaintiff in 1984-1985 T.106. Petitioner states there was eleven or more overruling by the court in his favor in Booker testimony.

Richard Gray, a black co-worker for twenty years of Plaintiff testified to the following; the verbal abuse and treating different of blacks by the Defendants than whites, that he transferred off his job (piston station) for Plaintiff to work because it was more suitable for him T. 78. Ann Huguely, black female foreman, testified to the following; to defendant

Quick, her boss, harass and disparate treatment of blacks including herself and treating them different from whites T. 202,209, they did not get along, they disagreed, she felt it was because she was a black female foreman T. 208, 209,to Plaintiff high seniority which was stipulated by the court T. 154, Winston Reed, black co-worker, testified to the Defendants disparate treatments of blacks T. 119. Gene Baker white co-worker testified he had two weeks seniority less than Plaintiff and that the Defendants seldom bother him, they respect his codes, he was never written up T. 219,226. Jim Parker, black foreman, testified to the following; that he saw Plaintiff and Defendant in heated arguments over job performance and restrictions, also when foremans could not find a job for Plaintiff they was to report it to Quick, that Plaintiff was good trucker before his surgery, to the size of

the department and his escorting Plaintiff doctor around it to find him a job, it was a large department but he only showed him eight jobs out of 50 T. 394,397,391. Dr. Duarte testified to performing surgery on Plaintiff & to his restrictions (codes) which was stipulated by the court, he stated because of his medical condition he would be on medication for life and would not get well, he stated he was invited to view jobs for Plaintiff at Delco Moraine, but was only shown a few jobs in a large department he made recommendation for jobs (which he knew nothing about) for Plaintiff to do, he later received a letter from Plaintiff concerning those jobs that he thought was threating but realize he was giving him a message T. 254,256,280, Ex.34. Dr. Tytko Plaintiff medical physician testified to his medication and chronic neck pain and did not foresee any cure for him object/overrule by court T. 62,65.

Dr. Dawson, Plaintiff Psychiatrist, testified that his medical condition is aggravated by emotional distress... when angry experiences physical pain T. 47, he sent two letters to Delco Moraine asking them to "stop harrassing or placing him in stressful situations" T. 44,45 Ex. 4. Dr. Mobley, Plant Medical Director, in cross examination by Plaintiff testified that there was other jobs found by the search committee in other departments he could do but was not offered to him T. 421,422. Ken Hawkey, District Committeeman who writes grievances for members of his district, testified to the following; Plaintiff followed the grievance procedure of the contract between Local 696 UAW & Delco Moraine GMC T. 174 Ex. 21 and that four people had more seniority than he, that the National and Local Contracts being the same, & he never told him to go to second shift T. 174,175,240, object/overrule by

court, Plaintiff had seniority to hold days according to the contract Ex.32, he knew of plaintiff injuries/codes & the no-work passes given to him by foreman Schfeek was a contract violation, Paragraph 80 which states in peritent parts; "If you were brought to work or allowed to come to work, and there's no work avialable and you are sent home, you're paid four hours pay" object by defendant overrule by court T. 182, Ex. 24, he filed grievance for Plaintiff being transferred to second shift and for disciplinary DLO #735527/5-5000 T. 197, also a grievance for discrimination paragraph 6 & 6a "if an employee feels that he has been discrimanted against because of race or whatever, he has a right to file a 6a grievance...and charged mgt with it's violation of the N.A. and violation of document 30,31,32, and stated Plaintiff be paid all monies due to the violation Ex. 20, he stated this grievance has

never been settled which was referred to the Fair Employment Practices Committee T. 222, he stated management violated the Local Seniority Agreement T. 375, he also file paragraph 71 for not offering overtime to this grievant but charging him for it Ex. 23. These are the grievances Hawkey file 1644-32, 162915, 164529, 164489, 735527, 734134, 734139, 734143, 734142, 734-144, 536021, 164431, & 735619, Ex. B He stated there was other grievances filed but was lost. Four of the above grievances was settled a flat rate of 450.00 dollars, one was sent to Fair Employment Practices the others was withdrawn without prejudice. In cross examination Hawkey said that's right to the question by defendant, if an employee feels that he has been discriminated because of race or whatever, he has a right to come in and file a

6a grievance, he further testified he and Quick signed the 2-20-85 grievance that grievant was medically code from working the piston station job T. 171,172. Mark Dobson testified to the following; that he was chairman of shop committee, at that time, over all bargaining committes and signs all grievances T. 374, he sign the union ðs Statement Unadjusted Grievances, B-734139-U261, B-734142-U258, B-734142-U259 & B-734144-U200 Ex. 13 he stated Management violated par. 80 of National Seniority Agreement, Local wage and Seniority Agreement and the grievant is owed all benefits and moneys lost. I signed it as chmn of shop committee" he stated, "we processed and settled all grievances we had that were sent up to my step of the grievance procedure Dorris Duff must have settled them at the third step of the grie-

vance procedure" T.376, he stated the transfer of employees is the sole responsibility of management, subject to the following paragraph. The provisions of these paragraphs shall be applied without discrimination because of race, religion, color, age sex or national origin; and equal employment opportunities will be afforded to all employees". He furter stated the union protests and argues for the employee if they are not satisfied T. - 387,388. He stated Robinson was told by mgt. in 536 dept to work to work every day and clock in. he would then be told by them whether there was any work avialable for him within his codes, grievant did as he was told, he came to work and was sent home, however there was work he could do. Jack Kinderdine, Plant 5 Manufacturing Supertindent, Defendant witness testified to

the following; that the 82 & 84 green and brown books was the contract between UAW & GMC & paragraph 63 a & b was discrimination T. 251, 249, he & a search committee looked for Plaintif a job and found one in 518 on inspection where medical opinion is required Ex. 37, T. 259. Dr. Mobley testified that the search committee did find a job in that department Plaintiff could do but was not aware if it was offered because she did not make job assigments T. 421, 422. Kinderdine testified that at a meeting discussing Plaintiff a job was other high ranking officials of Delco Moraine T.260 and that it was decided to revise the put-up-piston job for him on second shift because he did not have seniority to hold days T. 262 he knew Robinson had less seniority than Richard Gray who was performing that job on day shift T. 263. Richard

Gray testified that he transferred off the job because it was more suitable for Robinson to work T. 78. In a letter written by John Scott to Schfeek stated "Gray was temporarily off the job" Ex. C-6 T. 287. Ken Hawkey testified to paragraph 72 of the contract in pertinent parts; "by written stipulation between mgt. and union could remove a higher seniority person off a job and give it to an injuried/occupational disease person with lower seniority" T. 253, 254, also Plaintiff had seniority to hold days which was stipulated by the court T. 154. He further testified that he and Quick had signed a grievance on 2-20-85, that Plaintiff could not work the job because of his medical condition. Quick testified that the job could have been modified on day shift T. 176. Kinderdine testified thay was aware and made the decision to place plain-

tiff on second shift with knowledge of his seniority. In crossexamination of Kinderdine by Plaintiff, he stated "we were part of Delco Moraine certainly they knew, whoever "they" is T. 276 Plaintiff made a motion following this statement to brin5 Delco Moraine GMC back in as a party, the court stated in pertinent parts; "I don't care if you get the President of the U.S.A. in here...Delco Moraine is not a party to this lawsuit". Kinderdine further testified that Quick had resigned & he demoted Schfeek who is no longer at Delco Moraine. Ex. 8, T. 296, he stated he was aware of the discipline problems before the decision was actually made and was involved at some point T. 266. He stated Plaintiff was not offered a job out of his department T. 296, 298. Dr. Mobley testified to the search committee lead by Kinderdine

and stated they decided to devise the piston station job and put Robinson on second shift, when question by Plaintiff why second shift and not days she replied she had nothing to do with the shift, object by defendant overrule by court T. 416, 423,424, she testified Gene Baker has the same code as Plaintiff T. 424. Kinderdine further testified that if the contract between UAW &GMC was not followed as written it would be contract violation object by defendant overrule by court T. 282, 292, the court stated the answer may stand. Defendant Dave Quick testified to the following; being a former employee of Delco Moraine from 1978 until 5-9-86 when he resigned, he never called Plaintiff a no-goodblack son-of-a-bitchT. 541,542, he did not know Richard Gray had put in a transfer to go to another department (Kinderdine,

Richard and others said he had been transferred), he and Plaintiff had heated arguments but did not exchange name calling T. 540, he received a card from Plaintiff from Texas Ex. 35 T.579, in cross examination he never sent coded white people home (no work) without pay T. 559 but Plaintiff was being sent home each day without pay (no work) T. 560, and was not allowed to work his overtime but was charge for it T. 564, Quick stated he would make incomplete brakes (put on cars kill children) because the car could not stop T. 566, 567, he testified to the contract violation and the make out system T. 572, 574 (same as Booker testified) he stated coded employee could be place on a non coded employee job T. 587 (Gray was not coded) and to his resignation eight months after Plaintiff seniority was cancelled T. 593

he stated Baker was not order to work against his coded T. 596 and the job Plaintiff was ordered to work on second shift could have been modified on day shift T. 588, 589. Defendant Zola Peck (deceased) testified to the following; she was injuried during a bicycle marathon and was restricted by her doctor and did follow his orders T. 504,505, she knew Plaintiff had medical restrictions/codes but discipline him for refusing to do certain jobs T. 506,509. Deacon Bozie Miliner testified to Plaintiff character, that he was a christian and a very devoted family man, he loved his children and supported them also he too was a Deacon. Miliner stated he knew him for over thirty years. Lucille Mosley (black) employee in 536 department testified to working with Plaintiff since 1971 and knew of

his surgeries /codes, she stated she too was coded and had it lifted to work certain jobs because when you are coded nobody wants you, in cross examination by Defendant she stated she had four surgeries since 1985, from 1983-85 she had been on sick leave many times in 1985 she suffered another job related injury T. 235, she stated she is not working nor is she receiving worker's compensation T. 237 (the same as Plaintiff).

On 12-2-87, the jury returned a verdict against Plaintiff in favor of Defendant, concluding that neither Defendants intentionally discriminated against Plaintiff Robinson on the basis of his race.

On 12-3-87, Plaintiff filed a timely motion to overthrow bias verdict and for a new trial Fed. Rule 59. On 12-10-87, he amended his motion. On 3-

8-88, Plaintiff received from the Court Judgment in a Civil Case, overruling Plaintiff motion to overthrow bias verdict and moton for new trial and emeregency relief and overruling Plaintiff amended motion to overthrow bias verdict of jury.

Plaintiff appealed his case to the Sixth Circuit on 4-7-88. On May 15, 1989, they affirmed the District Court decision.

STATEMENT OF THE CASE

(Part Two)

On 9-26-86, Plaintiff filed a complaint against the Defendant, Local 696 UAW for discrimination and depriving him of his rights after receiving a right-to-sue-letter from E.E.O.C. which states in pertinent parts; "All Tite VII jurisdictional requirements have been met". Plaintiff states

the Defendant failed to represent him equally according to the contract between UAW & GMC as they did whites and coded whites and substance abuse members. Plaintiff had suffered an industry injury and was treated different he was harrass daily by his supervisors he was told to come to work daily , which he did, however, he would be given no work passes and sent home Ex. 8.

Plaintiff filed grievances through Ken Hawkey, shop committeeman & Tommy Hoskins, ex-committeeman, for placing him on jobs he could not do by his supervisors Ex. 9, when he could not keep up they discipline him (DLO), union and management settled these grievances and paid him $450.00, however Management continued to harrass him by bringing him to work each day giving him a pass stating no work for him and sending him home without pay.

Plaintiff filed a list of grievances through Hakey over his supervisors wrong doings. Some of them was for regular (40) hours per week paragraph 80, overtime paragraph 71 discrimination paragraph 6 & 6a, & disciplinary shop rule 12. Plaintiff had access to one grievance file on 2-18-85 #164889, and the number to three others #734-142, 734144 and 734143, because union do not furnish grievances to members. One grievance #164489 was for overtime which he was denied for over a year. Plaintiff union (Hawkey) and employer (Quick) settled this grievance to avoid paying him, it stated, "grievant is medically coded from working assembly line' (piston station). Following the settlement of the grievance, On 8-5-85, Plaintiff was order to go to second shift by this same supervisor (Quick) and work the same job (he was coded from

working) He asked his supervisor if he was going to reimbursed him for all his back monies, he stated no. Plaintiff requested and received two of his union representatives, Ken Hawkwy, committeeman and Joe Dowling, committeeman at-large. Plaintiff explained his problems and stated he had seniority to hold days, he was the top six out of 50 and ask his committeeman, do the contract protects high seniority, committeeman said yes, Joe Dowling, told Plaintiff to forget the grievance and contract and go to second shift. Plaintiff asked him if they was going to protect him the same way they protect white union members with high seniority, he stated go to second shift or be fired.

Plaintiff was discipline and sent home. Hawkey (committeeman) told him to come over to the Union Hall and file a protest grievance. On 8-8-85 Plaintiff

did file his grievance #735527/5-5000 and requested to see president of the Union, Johnny Spencer, to voice his complaint concerning his grievances & the Contract violations, Spencer turned him over to Dorris Duff, 2A representative. Plaintiff explain to him about his contract rights being violated, Duff became hostile and stated you have a hard head always running around talking about your rights acting like an attorney, trying to protect other people jobs, now you are going to loose your job, leave & don't come back. Plaintiff never went back but did send a letter on 8-27-85, they did not respond.

On 9-17-85, Plaintiff seniority was cancelled almost two months after he filed his protest grievance. On 1-7-86, Plaintiff sent another letter to his union president, Johnnie

Spencer & Mark Dobson, chairman of shop committee, concerning his grievances & job, they did not respond.

On 10-21-86, Defendant file his answers and counterclaim, He admitted Plaintiff was black and did file several grievances, but stated, "all of them had been settled as of this date: and that "Plaintiff came over to union hall & talk with president Spencer who referred him to Mark Dobson, who handles all grievances for entire local". On 11-3-86, Plaintiff filed motion for Declaratory Judgment Injunctive Relief, Reinstatement and Back Pay Federal Rule 57, because of Defendant admission of guilt to grievance procedure of the contract. In Defendant counterclaim, he state Plaintiff did not file within the 6 months statutes of Limitation nor did he exhaust his internal union remedies. However,

Plaintiff received a right-to-sue-letter from E.E.O.C.. On 4-10-87, Defendant file motion for summary judgment and stated there was only two jobs on days Plaintiff could do within his codes, the Company elemi-nated one, the other a person with higher seniority was working it". Plaintiff needed to report to second shift and file a grievance, the rules was work & grieve". Howevwe Plaintiff continued to report to work on day shift, He stated, "Plaintiff never filed a grievance over the transfer nor over the "voluntary quit" or dis-charge, also he had stated he filed 15 grievances concerning contract viola-tion, but they had no knowledge of them dating back to 1984. Defendant had affivadits signed by Mark Dobson, chairman of shop committee, & Dorris Duff, 2A representative stating, Pla-

intiff never asked them to grievance, however, he stated Plaintiff did file some overtime call-in-pay grievance which he said was without merits and was withdrawn without prejudice by Dorris Duff. He further stated that the E.E.O.C. charges did not mention discrimination. The Defendant stated, Plaintiff was required to file a grievance over his discharge, than the union's duty would have been triggered, without the grievance there was nod disparate treatment. Also that other white employees mention in Plaintiff complaint and the union brought back was treated better tham Plaintiff; Floyd Rickrell,alcoholic, shooting firecracker, Charlie Brown stealing, Tom Brogahagen sabotaging, all fired & rehired; Eva Lewis, Gene BAker,& Homer Anderson all coded with less seniority than Plaintiff was never

harass and did receive favorable treatment.

On 1-2-87, Defendant file a Motion for extension with slanderous remanks; that Plaintiff suffered a gun-shot wound in 1984 (Plaintiff was not shot in 1984). On 1-5-87, Plaintiff file motion to strike; Declaratory Judgment with Injunctive Relief, Object Defentant extension because he missed the deadline for filing; however, it was granted to him by the court. On 2-2-87, Plaintiff submitted a settlement to the Defendant as ordered by the court. On 4-20-87, Plaintiff filed motion to object Defendant summary judgment, motion to strike slanderous, remotion for summary judgment jury to settle issues. Plaintiff had obtain his packages of grievances from his employer attorney, Joseph P. Buchanan, 2580 Kettering Tower, Dayton,

also the false affivadits signed by Mark Dobson and Dorris Duff. On 9-30-87, Plaintiff filed motion for new discovery. The Defendant had got back to work six or more drug abuse fired employee this was publish in a news-letter, also a signed sworn statement by witness Beulah Booker. On 11-18-87, Defendant asked the court for ano-ther continuance of the trial which he did. On 12-3-87, Plaintiff motion to object. On 1-21-88, Judge Rice "moot" Plaintiff object to Defendant Union's extension continuance of trial etc, he overruled Defendant harrassment of Plaintiff etc, he overruled motion to strike and relief, but stated if "retialiation claim under 42 USC 1981 survives, same will be tried to a jury" On 1-19-88, Plaintiff filed a motion for Judge Rice to withdraw because of bias and prejudice because of the

continued postponement of the trial & other favorable treatment for the Defendant. On 6-29-88, Judge Rice "moot" Plaintiff motion for documents, etc. On 2-5-88, In the Court decision, he sustained Defendant Motion for summary judgment and overrule Plaintiff motion for summary judgment, he stated, "there is no properly documented evidence in the record in support of Plaintiff's contention that Defendant failed to properly pursue any of Plaintiff's grievances, accordingly, Plaintiff's motion for summary judgment must be overruled as a matter of law" . The court condludes that Plaintiff complaint was sufficient to statea claim for retialiation under 42 USC 1981 & Section 704 (a) of Title VII, 42 USC 2000 e-3 (a), also for Defendant Counsel to depose Plaintiff in order to flushout the details of Plaintiff retialiation

claim. Following deposition Defendant will have twenty days which to filed a renewed motion for summary judgment. Plaintiff will have twenty days which to file his memorandum contra said motion.

On 2-16-88 Plaintiff was depose by the defendant with the use of his tape recorder. On 3-4-88, Defendant filed his second motion for summary judgment. On 3-25-88, Plaintiff filed his summary judgment memorandum contra. on 4-29-88, Defendant filed a supplemental memorandum late. On 6-29-88, the Court overruled Plaintiff motion for summary judgment and sustained Defendant motion for summary judgment for Defendant against Plaintiff, termination entry. On 7-15-88, Plaintiff appeal his case to the Sixth Circuit. On May 15,1989, the Court of Appeals affirmed the District Court judgment.

ARGUMENT AND LAW

THERE ARE IMPORTANT REASONS WHY THE COURT SHOULD EXERCISE IT'S DISCRETION AND GRANT CERTERARORI.

When Plaintiff filed his compaint against Defendant Quick, et al, on 6-26-84, he was being treated discriminate against, treated different from that of other white and coded white employees. As testified by Ann Huguely, Beulah Booker, Richard Gray, Winston Reed & Gene Baker, 42 USC 1981, 704 (a) 2000-3 (a), Daniels V. Board of Education, supra ; Jackson v. RKO Bottlers of Toledo, supra; Winston v. Lear-Sigler, 558 F.2d 1266 (6th Cir. 78). Huguely & Quick testified whites coded was not being harras nor sent to another shift. Gene Baker testified he was not harass "you have to make them honor your codes" he never said he worked in two years; Reed & Gray testified to Baker coffee drink-

ing and socializing with the Defendants.

On 8-5-85, Plaintiff was ordered to go to second shift by his supervisor to work a job that had been previously negotiated on 2-20-85, by Quick & Hawkey' not to work, this was a contract violation. The Civil Rights Acts of 1866 and the Fourthteen Amendment states in pertinent parts; "Negroes have a right to make and enforce contracts". The Defendant stated Plaintiff was notified on 8-3-85, to go to second shift; however, He testified to Plaintiff being on vacation, an exhibit showing he was in Texas.

The Court of Appeals affirmed the District Court judgment and stated there was three jobs that Plaintiff possible could have done, the "outboard shoe job, the inboard shoe job &the washer, plug & bolt job". However, the outboard & inboard shoe jobs

was the onesZola Peck & Ann Huguely discipline Plaintiff on. a grievance was filed by Tommy Hoskins, Plaintiff was paid a flat rate of $450.00 because of his medical condition/codes. The washer, plug & bolt job mention was no such job, this is what Plaintiff written in a letter to Dr. Duarte, who testified to it, Ex. 34, T. 280. Regarding the outboard & inboard shoes jobs Dr. Mobley testified Plaintiff condition could change in performing those jobs, also testified by Dr. Duarte. The Court of Appeals stated, when the banjo job no longer existed, a meeting was held involving seven members of theplants management & medical personnell to identity an appropriate job for Robinson, noteably neither Quick/Peck nor any union personnel attended". However, Plaintiff states

Jack Kinderdine testified he made the decision to transfer Robinson to second shift T. 262. Mark Dobson testified the transfer of employees is the sole responsibility of management but they cannot discriminate because of race, color etc. T. 387,388. Kinderdine further stated, "it was agreed to revise the piston station job and send Robinson to second shift because he lack seniority to hold days. Richard Gray testified that he had transferred off piston station job on days for Robinson to work it. In a letter from Roy Schfeek stated Gray was off the job. Hawkey, Dobson, Huguely, Quick & Kinderdine testified that an injuried of occupational disease employee with less seniority could replace a more seniority person by written agreement between union & management. Kinderdine stated if the contract was not followed, it

would be a contract violation, object by defendant overrule by court who stated answer may stand. Hawkey, Huguely & Quick testified and the Court stipulated Plaintiff had seniority to hold days. Quick stated the job he order Plaintiff to go to second and work could have been modified on days. Mobley testified to jobs found by Kinderdine & the search committee but did not place Plaintiff on or offer.

The Court of Appeals stated, Milton Anderson, Delco Moraine Personnell Director, sent Plaintiff a 64D letter stating if he didn't come to second shift, he would lose his seniority. However, Quick, Hawkey had already signed a grievance Robinson could not work that job. The Appeal Court further stated, Robinson never asked the union to grieve this letter, but on 8-27-85, Robinson sent

a letter to Milton Anderson & Mark Dobson concerning his shift change & job, again on 1-7-86, Plaintiff sent a letter to president, Johnny Spencer & Dobson, concerning his grievance & the contract, they did not respond. In a deposition given by Plaintiff to Defendant Local 696 UAW, Plaintiff stated Dorris Duff 2A Rep. started an argument with him at the union hall, using abusive language, and he feared for his safety and left, prior to this time Duff became abusive before with him at the union hall, Depo. 48,52 ,53, Defendant attorney, Hunter, did not object to the statement. The Union (Dorris Duff) became hostile as in Clayton v. UAW, 451 U.S. 679 (1981) where the union officials are so hostile to the employe that he could not even hope to obtain a fair hearing on his claim. The Supreme Court ruled recently that if a union

fails to prosecute on behalf of black employees, they can be held liable under C.R.A. 1866 Title VII of 1964 C.R.A. U. S. Law Week vol. 55 1986-87 Term no. 85-1626, 85-2010 4881. The Appeal Court stated ,"a trial judge cannot substitute his own judgment for that of the jury except when the jury's verdict is against the clear weitht of the evidence. A jury's verdict that could have reasonably been reached should be left undisturbed". The record will show and Defendant admitted in Robinson v. Quick/Peck, supra, he had blacks excluded from the jury selection. In Defendant Quick brief he stated, "the jury venie in the instant case was typical of a jury venice in the Southern District of Ohio, Western Division, which draws many of its jurors from rural counties and small towns which have a predominately white population.

The Defendant had blacks struck as in Hernanez v. Texas, supra, The Ala. Supreme Court found that negroes commonly on trial venies but are always struck by attorneys in selecting the jury trial 275 Ala. 508, 515, 156, So. 368, 375, the exclusion of negroes from jury service in all other cases was produced solely by the action of defense attorneys. In Swain v. Ala. supra, under well established principles this evidence clearly makes out a pira facie case of the denial of the equal protection which the Constitution guarantees, Norris v. Ala., supra, discrimination against any delienated class. Plaintiff states, the record will show, during the time of his trial there was four other cases involving blacks in the District and Common Pleas Courts of Ohio; three black plaintiff and one black defendant; Dr. Bouquette, CR-3

86-1, McAlpine v. GMC Truck & Bus, 3-C.V. 85-000, & House of Wheat v. Miami Valley Broasting et al,82-923, 82-922, each receive an all white jury & lost.

The Court of Appeal affirmed the District Court decision of granting Defendant Local 696 UAW summary judgment against Plaintiff, Joe L. Robinson.

On 9-26-86, Plaintiff filed a discrimination complaint & conspiracy against his union for depriving him of his rights. He stated the union failed to represent him the same as they did whites and coded whites members. In the Defendant answers,he stated, these employees are not similar situated with Plaintiff and their grievances.

When the District Court granted Defendant summary judgment, it was after the trial of Robinson v. Quick/Peck, supra, after the testimony of Hawkey who stated Plaintiff filed his gr-

ievances according to the contract paragraph 28-30, also his testimony to paragraph 72 injuried or occupational disease employees with low seniority can be place on job of high seniority person with agreement between union & company T. 176. He further testified he was knowledge of Plaintiff injuries. However, in Defendant summary judgment and in his answer, he stated thaey had no knowledge of Plaintiff injuries. Hawkey testified to Plaintiff being paid a flat rate of $450.00 for grievances file for disciplinary, the same way (committeemen) files all grievances. He testified to all grievances filed including the one on 2-18-85 with answer on 2-20-85, grievant medically coded from working job, (piston station) athe one file on 8-8-85, shift change and disciplinary, he filed frievance for regular time paragraph 80, over-

time paragraph 71, T. 183, for paragraph 6 & 6a discrimination, he further stated there was grievances he filed that was lost. He testified he heard Quick tell Plaintiff, Schfeek informed him of the shift change on Thursday, T. 197. Hawkey testified he talk to Plaintiff on 8-5-85, advised him that his high seniority stands also to the contract and stated certain things management can do and others they cannot do, T. 202. He stated he never told Plaintiff to go to second shift because he had time to hold days object by defendant overrule by Court, T. 239, 245. Mark Dobson testified to contract violation and to the grievances, he stated as chairman of shop committee, he signed all of them that came to him, Dorris Duff must have settled them at the third stp of the grievance procedure. He stated the grievances did have

merits because they were the contract. T. 374,376.

On 2-16-88, Plaintiff gave the Defendant a deposition to flush out the truth as ordered by the Court. In the deposition, Plaintiff stated Joe Dowling, committeeman-at-large, & Dave Quick, general foreman, conspired to send him to second shift. Question by Defendant was the Union & Company in cahoots, Plaintiff answer, yes Depo. 24. When question to Plaintiff if the Company made the decision & then Mr.Dowling encouraged you to to along with it, do you think he actually played a part in the original decision, Plaintiff answer, from his indication, he did both. Depo. 25. Plaintiff stated in his deposition, that Dowling & Hawkey was standing there when Quick made derogatory remarks to him about his color, Depo. 28, also explain the grievance signed by Quick/Hawkey on 2-20- 85

Depo. 37. Plaintiff states when he asked Duff concerning getting his back pay, Duff used foul language, Depo. 38.

The Appeal Court stated in Robinson's claim against the union under Rule 56 (c) in pertinent parts; "judgment is proper if the pleadings, depositions, answere to interrogatories, & admissions on file, together with the affivadits, if any, show there is no genuine issue as to any material fact & that the moving party is entitled to a judgment as a matter of law". Plaintiff states he presented genuine evidence from the trial of Robinson v. Quick, supra, from his witnesses testimonieswith stipulations and many rulings in his favor by the court; Hawkey, Dobson, & Kinderdine testified to contract violation, which was ruled upon by the court; Booker, Huguely, Gray, Mosley, Reed & Baker testified to discrimination

by the Defendants against him. Plaintiff presented his Deposition with flush out truth, which the Defendant did not object to. Defendant admitted he had four grievances which he had settled, he admitted Plaintiff was black , the people in his complaint was white. Plaintiff states the affivadits of Dobson & Duff was bad faith affivadits (false). The Defendant failed to state that Ken Hawkey (committeeman who filed grievances for Plaintiff's shift change & DLO) was at the union hall on 8-8-85. However, Hawkey testified to the facts that he did. Plaintiff presented sworn statement by Booker to the return of substance abuse members back at work (white).

At the trial of Robinson v. Quick/Peck, supra,Plaintiff obtained about fixteen grievances from his employer that was filed by Hawkey, included was

grievances for Paragraph 80, short work week; paragraph 71 overtime; paragraph 6 & 6a discrimination & disciplinary, also a grievance filed on 8-8-85, for shift change and D.L.O. Most of these grievances (except four) Defendant denied existed. He stated, with signed false affivadits Plaintiff never filed a grievance for his shift change on 8-5-85. He stated the grievances Duff withdrew was for overtime and could not give Plaintiff the relief soughted. However, he denied Ken Hawkey existed, altho Hawkey testified he was zone committeeman with 25 years of seniority & was at the union hall & did file a grievance on 8-8-85, also a grievance for discrimination paragraph 6 & 6a forPlaintiff.

Plaintiff brought to the court attention in a motion for Declaratory Judgment on 3-3-86, that Defendant

stated he had settled all of his grievances but failed to give him his back pay, again on 1-5-87, 4-20-87, because the Defendant filed false documents & slanderous against plaintiff & failed to produce monies from settled grievances. Defendant was certain Plaintiff could not get his additional grievances therefore, he was filing false documents. Defendant refuse to supply Plaintiff with his other grievances , however, from Plaintiff other trial with Quick et al, attorney, Joseph P. Buchanan, 2580 Kettering Tower, Dayton, Ohio 45423, (513) 233-6211, supplied Plaintiff with his full package of grievances, medical package, etc.

Following the Defendant filing of false documents and slanderous material, he started asking for extensions which the court granted.

The Court of Appeal stated in per-

tinent parts; Robinson's challenge of the District Court grant of summary judgment for the union on his claim of retialiation....to make out a prima facie case of retialiatory discharge under Title VII, 42 USC 200 e (3) (a) Robinson must show:

(1) That he engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding.

(2) That he was subject to adverse employment action subsequent to or contemporaneous with his protected activity.

(3) There is a casual connection between the protected action & the adverse employment action.

On 2-16-88, Robinson took a deposition with witnesses, Beulah Booker, Attorney, Michael Hunter, Sue A. Terry, R.P.R., notary republic, Jenny Ebnerd

& Ass. 411 BancOhio Bldg. Springfield, Ohio 45502 (513) 322-3009. Robinson testified he filed a discrimination complaint in the early 70"s through the Ohio Department of Civil Rights against the Union. He testified to another employee who had problems with Mr. Duff; words exchange between this employee, Beulah Booker,Robinson & Duff over the fact, Mrs. Booker had been sent out the door with the balance of the shift, because of industrial injuries and the union had failed to process her grievances, they withheld vital doctor information from higher union official, Cecil Hampton, out of Detroit, Michigan, who came down to process her grievance. When Booker supplied them with her doctor statements, he acted surprise and immediately clear her record with full back pay. In Robinson deposition he stated,

Duff told him he was hard headed & had a record of sticking his nose in other people business. Depo. 31, also because "you help Mrs. Booker now you are going to loose your own job" Depo. 34. Question by Hunter, "did he actually say the to you", answer,"he sure did", question by Hunter "that because you helped another employee get their job back, you were going to lose your own"? answer "yes, he did", Depo. 35. Robinson testified that Joe Dowling insisted along with Quick to send him to second shift, despit it was a contract violation. Depo 24.

The Appeal Court stated, "there is evidence in the record that the union prevailed upon GM to transfer or ultimately terminate Robinson". In Robinson deposition he testified to Duff & Dowling telling him to go to second shift or loose his job. When he

asked them about the contract, they said forget the contract. When Robinson mention violating the signed grievance by Quick & Hawkey, Duff & Dowling said forget the grievance go to second shift.

In the Defendant answers they admitted that Local 696 committeeman Dowling directed the Plaintiff to report to second shift and file a grievance", also in pertinent parts; Mark Dobson, chairman & Dorris Duff 2a Representative instructed him to report to second shift and file a grievance". The Supreme Court ruled that union who fails to prosecute on behalf of black employees they can be held liable under 1866 CRA Title II of 1964 CRA, U. S. Law Week, supra. Plaintiff had file various grievances dealing with contract violations; discrimination, shift change & discipline, short work

week paragraph 80, overtime paragraph 71, Hawkey & Quick answer to signed grievance on 2-20-85.

The Appeal Court stated in pertinent parts; ...Robinson has failed to demonstrate the requisite casual connection essential to a claim of retialiation....However, it is recognized that retialation for having protested against racial discrimination is, itself, racial discrimination, Winston v. Lear-Sigler, supra, Romero v. Union Pacific R. R. 615 F.2d 1304 (10th Cir. 1980). In Romeo the union discriminated against him for filing discrimination & E.E.O.C. charges, the same as the Defendant retialated against Plaintiff for protesting racial discrimination & contract violations.

CONCLUSION

Certiorari should be granted to Petitioner because Respondent, Dave Quick/Peck, et al admitted treating Petitioner different than other white coded employees. They admitted to the contract violations. The court stipulated Petitioner high seniority. They admitted Petitioner did filed a grievance on 8-8-85 for his shift change & D.L.O.

The Defendant, Local 696 UAW stated in their answers all grievances had been settled. They had no knowledge of other grievances mention in Petitioner complaint. They acknowledge referring Petitioner to go to second shift and grieve. They denied Ken Hawkey, shop committee with25 years seniority who file grievance for his district (which Petitioner was in) existed. Petitioner states all gr-

ievances are part of the contract, three stands out, one file on 2-8-85, answered on 2-20-85, "grievant medically coded against working assembly(piston station), to keep Petitioner from getting paid his overtime for two years; paragraph 6 & 6a discrimination, Petitioner was not allowed to work his regular hours (40) per week nor was he paid short work week according to the contract, however there was work he could do, the 8-8-85 grievance Hawkey file for Plaintiff at the union hall for shift change and D.L.O., Dobson & Duff signed affivadits this grievance did not exist, they denied Hawkey existed.

The Defendant retialiated against Plaintiff for protesting racial discrimination and by helping another employee who was being discriminated by them.

Respectfully Submitted,

Joe L. Robinson
5208 Whaley Drive
Dayton, Ohio 45427
Telephone: (513) 854-2789

Joe L. Robinson

Subscribed and sworn to before me by Joe L. Robinson on this 14th day of July 1959

James G. Miller

JAMES G. MILLER, Notary Public
In and for the State of Ohio
My Commission Expires Mar. 6, 1962

APPENDIX

Appendix "A" — Robinson v. Quick/Peck, et al; Local 696 UAW.

Appendix "B" — Robinson v. Quick/Peck, et al

Appendix "C" — Robinson v. Local 696 UAW

CERTIFICATE OF SERVICE

This is to cerify that three copies each of the Petition for Certiorari is being to the names listed below by U.S. Mail, postage prepaid this 17th day of July 1989;

Joseph P. Buahanan, 2580 Kettering Tower Dayton, Ohio 45423 Counsel for Defendants, Dave Quick/Zola Peck, et al; and Frederick G.Cloppert, Jr. 225 East Broad Street, Columbus, Ohio 43215 Counsel for Local 696 UAW.

Joe L. Robinson

Signed this 17 day of July 1989 before me a notary Public in and for the State of Ohio

Notary Public, State of Ohio
and for Montgomery County, Ohio
My Commission Expires June 4, 1993

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOS. 88-3298 & 88-3655

JOE L. ROBINSON, Petitioner

vs.

DAVE QUICK AND ZOLA PECK*,

LOCAL 696 U.A.W., Respondents

(May 15, 1989)

BEFORE: JONES, WELLFORD, and GUY,

Circuit Judges. Guy, Circuit Judge.

In this consolidated appeal, plaintiff,

Joe L. Robinson, appeals the district

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*By letter date 3-25-89, this court was informed of Zola Peck's death following the trial of this case.

court's judgments in two separate actions stemming from events leading up to and including his termination from employment with the Delco Moraine Diviaion of General Motors (GM) in Dayton, Ohio. Robinson represented himself pro se in all prior proceedings, and continue to do so on appeal, In his first action (I), Robinson sued his GM supervisors pursuant to 42 U.S.C. 1981 claiming that they discriminated against him in his job placement and discipline. The defendants prevailed in a jury trial and Robinson now challenges both the jury's verdict and its composition. In his second action (II) Robinson sued his union under a variety of theories for its conduct and representation of him in the events leading to his termination. Robinson now appeals the court's summary judgment ruling in favor of Local 696 of

the U.A.W. (union). After carefully reviewing plaintiff's contentions, we affirm the district court's judgments in both actions.

I.

Joe L. Robinson is a black man who was employed by GM continously from 1968 until 1985. During that time, he was a member of the Union. In 1974, Robinson sustained injuries to his neck, shoulder, and arm at work, which required two surgeries in 1983. Post-operatively, Robinson was medically restricted "coded") from performing certain jobs at work. Specifically, Robinson could only perform light work and was restricted to a twenty -pound weight limit. He could not perform assembly line work, overhead reaching involving pulling or lifting above the shoulders, or truck driving. (App.I, 374). From May through June of 1984, Robinson was disciplined for refusing

to perform job assignments that management classified as "light duty" but that Robinson claimed he was physically unable to perform.. After one such incident of discipline by Zola Peck, Robinson"s foreman, GM's plant medical director asked plaintiff's physician, dr. duarte, to visit the plant to evaluate Robinson's job and inentity other appropriate positions for him. Dr. Duarte complied and by letter dated May 1, 1984, identified three suitable positions for Robinson. [1] When Robinson subsequently refused to perform one of those positions, he was disciplined by another supervisor and filed a grievance, which was subsequently settled by the Union. After Robinson was again disciplined by defendant Peck, he filed another grievance and his first complaint in federal court.

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[1] These positions included the "out board shoe job," the inboard shoe job," and the washer, plug & bolt job. (Ap. I,237)

By early 1985, plaintiff's general Supervisor, Dave Quick, asked the plant medical department to assist him in identifying appropriate jobs that would copport with Robinson's codes. While the job search was underway, Robinson received passes to go home when there were no suitable productive jobs for him in the department. On an interim basis, he was assigned to an off-line position ("banjo job"), but that position was being phased out. Even in that position, however, Robinson was disciplined by Quick for non-performance during work hours. When Robinson was confronted about his non-performance, he allegedly stated that he had made enough banjos for the day and refused to return to work. Robinson grieved the disciplinary action, but the Union ultimately withdrew the grievance.

In August 1985, when the banjo job no longer existed, a meeting was held involving seven members of the plant's management and medical personnell to identify an appropriate job for Robinson. Notably, neither Quick, Peck, nor any Union personnel attended. As reflected in the meeting minutes (App. I, 375,377), several positions had previously been considered and rejected as violative of Robinson's code. (App. I, 374). Of three jobs given more serious considerstion at the meeting, one was rejected because certain aspects of it violated Robinson's codes and another was rejected because ot was the job Robinson performed when he was originally coded off assembly line work. The third position, the "Put-up-Piston" job, ultimately was selected for Robinson after it was agreed to modify the position to suit his codes.

Although the position also existed on the first shift, Robinson purportedly lacked seniority to occupt the day position. Accordingly, it was agreed to transfer Robinson to the second shift. (App. I, 375, 377).[2]

When Robinson reported for work on the morning of August 5, 1985, he was advised of his transfer to the second shift and instructed to leave and return later.[3] Robinson protested that the transfer violated seniority provisions of the collective bargaining agreement between GM and the UAW

2The actual decision to transfer Robinson to the second shift was made by Jack Kinderdine, the then manufacturing supertindent of the GM plant in Dayton.

3Because Robinson was on vacation in Texas when the transfer decision was made, he was unable to be notified of the change by phone, as planned. Accordingly, he first learned of his transfer when he reported for work the day the transfer took effect.

and refused to leave even when he was given a direct order to do so. Consequently, he received a disciplinary layoff (DLO) by Quick for refusing to obey the order. (App. I, 366). On August 8, 1985, Kent Hawkey, a Union committeeman, filed a grievance on Robinson's behalf seeking to overturn the DLO (App. I, 365). Robinson declined to follow other Union officials' advice to report to the new shift first and grieve the transfer later. Thereafter, Robinson filed no further grievances. Although he reported every morning for work, Robinson was denied entry for that shift by plant security. He never reported for work on his newly assigned second (afternoon) shift. A series of letters[4] ensued in which Milton Anderson, the

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4These letters are commonly known as Section 64 (d) letters" in corrsepondence with a collective bargaining agreement provision for loss of seniority

plant's associate administrator, warned Robinson that failure to report to his proper shift could cause him to lose his seniority. Robinson claims to have sent the Union a copy of one of these letters but never asked the Union to grieve it. Rther, Robinson responded to Anderson by letter in which he concluded: "I am reporting to work on Wednesday, August 29, 1985, at 6:30 a.m. I will show your letter at the plant entrance, that is all I can do". Anderson subsequently sent another warning letter to Robinson advising him that his continued failure to report for the afternoon shift assignments would lead to his termination. Robinson failed to comply and continued to report on the day shift. On September 17, 1985, Robinson received a letter from Anderson advising him that his seniority was terminated

for failure to report to work after written notice to report has been provided.

due to his failure to report for work. Robinson did not grieve his termination.

Although Robinson contends that his August 8, 1985, grievance protested the DLO and the shift change as violative of the collective bargaining agreement, and that he relied on the Union committeeman's expertise as to how such things were done, the grievance only protested Robinson's August 5, 1985, DLO and sought that it be disaffirmed. (App. I, 365).[5] This grievance was ultimately withdrawn by the Union when it was determined to be without merit. The discipline was deemed appropriate in view of Robinson's failure to obey a direct order, which

[5]The record copy of this grievance contains the following handwritten phrase at the top of the page: "Filed grievance shift change". It is unclear when or by whom this entry was made but it is not part of the grievance or disposition portions of the form.

violated "Shop Rule #12". Robinson did not appeal this disposition of his grievance.

Robinson's first complaint was filed against his supervisors, Zola Peck and Dave Quick, in June 1984 alleging that, unlike coded white employees, he was disciplined for his refusal to perform jobs contraindicated by his physical condition and physician's orders[6]. Although his initial complaint lacked factual allegations that the discipline was racially motivated, he was permitted to amend his complaint to particularize a cause of action 42 U.S.C. 1981.[7]

A jury was selected on November 23, 1987, and, although Robinson questioned the members about their ability to render a fair decision, he raised ho objec-

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[6]Initially, GM was not named as a defendant in this suit. The district

tions regarding the jury's racial composition until after the jury returned a verdict for defendants. The district court denied Robinson's subsequent motion for a new trial, finding that the verdict was not against the great weight of the evidence and that Robinson's failure to properly challenge the jury composition earlier precluded him from making such a challenge after the verdict had been rendered.

Robinson's action against the Union (II) was filed on September 26, 1986. It was brought initially pur-

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court rejected Robinson's later attempt to amend his complaint to add GM as a party.

7Robinson was permitted to allege that his supervisor discriminated against him in such ways as giving preferential treatment to a white medically coded employee, Gene Baker. Robinson continued to file, without leave of the court, numerous amended complaints seeking, among other things, to expand the statutory basis for his claim to include a Title VII claim. The district court in its discretion, allowed only those

suant to 42 U.S.C. 1983; 42 U.S.C. 1985 (3); section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185; 42 U.S.C. 1981, section 704 (a) of Title VII, 42 U.S.C. 2000e-3(a); and the fourteenth amendment of the United States Constitution. Following cross-motions for summary judgment, the district court granted the Union's motion as to all claims except Robinson's claims of retialiation under section 704(a) of Title VII, 42 U.S.C 2000e(3)(a) and 42 U.S.C. 1981.[8]

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amendments that supplemented his 42 U.S C. 1981 claim and ordered Robinson not to file further amendments without leave of the court.

8The district court dismissed Robinson's 42 U.S.C. 1983 and fourteenth amendment claims for want of any evidence of state action. Likewise, the lact of any proffered evidence of conspiracy prompted the court to dismiss his claims under 42 U.S.C. 1985 (3).

Robinson's retaliation claim alleged that the Union discriminated against him because of his support of his co-worker's racial discrimination action against the Union. Robinson had previously filed his retaliation claim with the EEOC and received a "right to sue" letter.

After deposing Robinson to flush out the basis for his retaliation clai, the Union again filed for summary judgment which was granted in June 1988. That judgment is also the subject of the present appeal.

I.

Robinson's Claim Against his Supervisors

A. The sufficiency of the Evidence

Robinson fir challenges the jury verdict for defendants Peck and Quick as being against the manifest weight of the evidence and necessitating a new

trial. We note that "the grant or denial of a new trial is purely within the discretion of the trial court and will not be reversed except upon a showing (of) abuse of discretion". Logan v. Dayton-Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989) (citation omited). As for Robinson's challenge of the sufficiency of the evidence as a basis for obtaining a new triak, we note that; A trial judge cannot substitute his own judgment for that of the jury except when the jury's verdict is

His LMRA claim was dismissed because it was barred by the six month statute of limitation. See Del Costello v. International Bhd of Teamsters, 462 U.S. 151. 157, 172 (1983). Robinson's failure to provide evidence of disparate treatment persuaded the court of the absence of any genuine issue of material fact concerning alleged racial discrimination Thus, the Union was granted summary judgment on Robinson's racial discrimination claims brought under 42 U.S.C. 1981 and Title VII, 42 U.S.C. 2000e-3(a). We are in accord with the district court's disposition of these claims and decline to address them further.

against the clear weight of the evidence A jury's verdict that could have reasonably been reached should be left undisturbed. Bruner v. Dunaway, 684 F.2d 422,425 (6th Cir. 1982); TCP Industries Inc. v. Uniroyal, Inc.,661 F.2d 542, 546 (6th Cir. 1981). Williams v. Union Carbide Corp., 790 F.2d 552, 554 (6th Cir.), cert. denied, 479 U.S. 992 1986)

In this case, after reviewing the evidence, the district court declined to grant Robinson's "Motion to Overthrow Bias Verdict, Motion for New Trial and Emergency Relief," or his Amended Motion to overthrow Bias Verdict of Jury." (App. I, 480, 484). Our review of the evidence persuades us that the district court did not abuse its discretion by denying Robinson's motions. Essential, the jury was confronted with two conflicting interpretations of the facts underlying Robinson's claim and

found the defendants' version more persuasive. For example, while Robinson elicited testimony from his co-worker that Quick called Robinson a "sorry, black, son of a bitch, " Quick vehemently denied making such a statement. While Robinson contended that Gene Baker a white medically coded employee with two weeks less seniority than Robinson was favored by being placed on an easy job that Robinson could have performed, Quick testified that Baker's job had been considered for Robinson but was rejected because it entailed trucking duties, which are contraindicated for Robinson. Robinson's perception of ' Baker's job duties was based on the observations of a co-worker who testified that he had seen Baker bring coffee to Quick and Peck but had never seen him do any physical work. Quick's contrary assessment of Baker's position was car-

roborated by various records and by medical and other management personnel.

Finally, the evidence shows that, notwithstanding Robinson's protests that his job placements violated his codes, the defendants and other management personnel conscientioulsy sought to accomodate his codes in his placement. Robinson relied on the April 6, 1984, letter signed by Dr. Duarte to obtain light duty work (App. II, 210), but declined to perform jobs that were subsequently personally identified as suitable for him by Dr. Duarte. (App. I, 237).

It is the province of the jury to weigh the type of competing factual evidence presented in this case. Because we, like the district court, are convinced that the jury's verdict could reasonably have been reached, we decline to disturb that verdict.

B. The Jury Composition Claim

We also reject Robinson's contention that the all-white jury was motivated by racial bias and prejudice, and his contention, as construed by the district court, that he was somehow prejudiced by the racial composition of the jury.

Robinson has presented no evidence suggestive of racial bias on the part of any juror beyond the fact that a verdict was rendered against him. If Robinson's challenge is based on selection of the jury venire, it is untimely because of its failure to comply with 28 U.S.C. 1867 (c). That section provides; In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party

may move to stay the proceedings on the ground of dubstantial failure to comply with the provisions of this title in selecting the petit jury. Moreover, section 1867 (e) provides that the procedures descrived in section 1867 (c) constitute the exclusive means by which a party in a civil case can challenge any jury on the ground that such jury was not selected in conformity with statutory provisions governing jury selection. It does not, however, preclude pursuit of other civil remedies aviable to vindicate or enforce laws against racial discrimination in jury selection. Robinson failed to challenge the jury selection procedures until after the verdict was rendered, rather than when he first became aware of the racial composition of the jury. Accordingly, the district court properly rejected his post-verdict statutory

challenge as untimely.

Robinson's constitutional challenge to the racial composition of the jury, however, is not controlled by section 1867 (c). Robinson claims that his equal protection rights were violated by the defendants use of peremptory challenges to dismiss two black persons selected for the jury. There is no doubt about theauthority to exercise peremptory challenges generally. 28 U.S.C. 1870. Some restrictions on the exercise of that authority, however, recently have evolved. For example, in Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court established standards to determine whether a prosecutor's peremptory challenges reflect purposeful discrimination in selection of the petit jury in a criminal trial.

In that context, to establish a prima facie case of purposeful discri-

mination, a defendant must first demonstrate membership in a cognizable racial group and that other members of his race have been removed from the venire via peremptory challenges by the prosecutor. A defendant may rely on the indisputable fact that peremptory challenges constitute a method of jury selection that allows "'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953). Finally, a defendant must show that the underlying facts and relevant circumstances indicate that the prosecutor employed this method "to exclude veniremen from the petit jury on account of their race." Batson, 476 I.S. at 96. The court in Batson indicated that an inference of discrimination may be found in a pattern of strikes against black jurors in a specific venire or in ques-

tions and statements made during voir-dire proceedings, or during theexercise of peremptory challenges. The Batson Court expressed confidence in the trial court's ability to determine whether peremptory challenges mask purposeful discrimination and whether a defendant can establish a prima facie case of such discrimination.

If a defendant make out a prima facie case, the burden shifts to the prosecutor to provide a neutral explanation for challenging black jurors, but that explanation "need not rise to the level justifying exercise of a challenge for cause." Id. at 97.

The applicability of thejury selection standards established in Batson to civil cases, however, remains an open question in our circuit[9] and a split question in other circuits. See, e.g.,

Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (Batson applies in civil and criminal cases); Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988) (reh'g granted en banc Jan. 23, 1989) (extending Batson analysis to civil cases); Wilson v. Cross, 845 F.2d 163 (8th Cir. 1988) leaving applicability of Batson to civil cases open by finding that if Batson analysis applies, no prima facie case of racial discrimination was established); Clark v. Bridgeport, 645 F. Supp. 890 (D. Conn. 1986) (Batson jury selection standards extend to civilcases involving state

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9In our unpublished opinion in Boykin v. Hamilton County Bd. of Educ. No. 87-4025 (6th Cir. Feb. 14, 1989), we noted that the trial judge accepted and the parties stipulated that Batson applied to their civil case. We declined to consider "whether as a general principle Batson applies to all civil cases."

action); Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986) Batson analysis is not controlling in civil case but if it was, plaintiff failed to make out a prima facie case of purposeful discrimination).

In this case, as in Wilson, 845 F.2d 163, we need not determine whether the Batson analysis extends to jury selection in civil cases because, even if it did, Robinson has failed to make out a prima facie case of purposeful discrimination. Applying the Batson analysis to this case for discussion purposes only, we note that Robinson,as a black man, is a member of a cognizable racial group. Although no transcript of the voir dire proceedings or record of the racial composition of the jury panel exists, apparently two black jurors were preemptorily removed, leaving intact an all white jury to weigh Robinson's claims. Thus, the defendants utilized

preemptory challenges to remove black venire members. Additionally, Robinson may rely on the fact that peremptory challenges provide a vechile for discrimination. Robinson fails, however, to make out a prima facie case of purposeful discrimination because he is unable to demonstrate that these facts and other relevant circumstances indicate that the defendants used their peremptory challenges to exclude blacks from the petit jury because of their race.

The jury venire contained approximately four black members, of whom two selected jurors were excused by defendant's peremptory challenges. Robinson never objected to the challenges before, during, or after the jury venire or voir dire. Rather, he asked the all white jury about their ability to render a fair verdict and, apparently

satisfied with their response, proceeded to try the case. It was not until the verdict was rendered that Robinson objected to the jury composition. Surely Robinson was aware of the composition of the jury and of the peremptory challenges that excused two of the four black persons in the venire. In his reply brief, Robinson states: "In voir dire of the jury, there was only four blacks, to went into the jury box, but was elemi-nated (sic) through challenge by the def-endants. One was eleminated (sic) by the court because she worked with one of plaintiff (sic) witness (sic). The other one was too far down the jury list to be placed in the jury box." (plain-tiff-Appellant's July 29, 1988, Reply Brief at 5). The fact that two black jurors were challenged by the defendants, one was excused for cause by the court, and one was not called to serve on the

petit jury does not establish a "'pattern' of strikes against black jurors included in the particular venire (giving) rise to an inference of discrimination." Batson, 476 U.S. at 97. Moreover, Robinson has not identified any questions or statements made by the defendants during voir dire that support an inference of discrimination. Finally, Robinson has not established any reviewable record or facts that might otherwise compel us to find that the circumstances surrounding the defendant's exercise of its peremptory challenges establish a prima facie case of discrimination against black jurors. It appears that the jury composition was acceptable to Robinson up until the point that the jury decided against him. An adverse verdict against a black plaintiff without more than what Robinson has presented to support his claim on

this issue is sufficient. Robinson's sparse allegations concerning purposeful discrimination persuade us that even if the Batson analysis extends to jury selection in civil trials, Robinson failed to make out the reqmisite prima facie case. Accordingly, the district court's refusal to grant a new trial on this issue was proper.

II.

Robinson's Claims Against The Union

Robinson's claims against the Union were disposed of in two separate summary judgment rulings in favor of the Union (App. II at 183, 199). Our standard of review of a grant of summary judgment provides: Under Rule 56(c) summary judgment is proper "if the pleadings, depositions, answers to interogatories, and admissions on file, together with the affivadits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law". In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact, " since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which

which she has the burden of proof.

"(T)h(e) standard (for granting summary judgment) mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50 (a)...." Anderson v. Liberty Lobby, Inc., ante, at 250. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (footnote omitted).

Confining our discussion to Robinson's challenge of the district court's grant of summary judgment for the Union on his claim of retaliation,[10] we first note that to make out a prima facie case of retaliatory discharge under Title VII, 42 U.S.C. 2000e (3) (a), Robinson must show:

> (1) that he engaged in protected opposition to Title VII discrimination or participated in a Title proceeding;

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[10]For discussion of Robinson's other claims, see supra note 8

(2) that he was subject to adverse employment action subsequent to or contemporaneous with his protected activity;

(3) there is a casual connection between the protected activity and the adverse employment action.

Jackson v. Pepsi Cola, 783 F .2d 50,54 6th Cir.), cert. denied,483 U.S. 1006 (1986) (citation omitted). The casual lind requirement is also an integral component of a retialiation claim under 42 U.S.C. 1981. Irvin v. Airco Carbide, 837 F .2d 724,727 (6th Cir. 1987). Although Robinson can establish the first two factors, he falls short on the third one. That is, the adverse employment action that occurred after Robinson supported a racial discrimination claim resulted from his own actions rather than those of the union. It was Robinson's refusal to comply with his shift change, despite repeated warnings of the consequences, that led to his

termination. There is no evidence in the record that the Union prevailed upon GM to transfer or ultimately terminate Robinson.

Robinson tries to establish the requisite casual connection by recounting heated discussions between Union representatives and himself. Speciafically, Robinson points to a warning issued by Union representative Dorris Duff that Robinson's support of his colleague's discrimination claim would lead to his job loss. Although relations between the Union and Robinson may have become hostile, that hostility is not necessarily tantamount to an intent to retaliate. Moreover, it was management and not the Union that decided to transfer, discipline, and ultimately terminate him.

Finally, Robinson claims that the Union retaliated against him with res-

pect to filing or processing his numerous grievances concerning overtime deprivations, discipline, and other management actions. The record is replete with grievances filed by Robinson, some of which were settled and some withdrawn. The Union has no obligation to pursue every grievance to arbitration and grievances without merit may be withdrawn. Vaca v. Sipes, 386 U.S. 171 (1967). Robinson never appealed the withdrawal of any of his grievances and there is no evidence that grievances were withdrawn for retaliatory purposes. As noted, Robinson's grievance of his August 1985 DLO was withdrawn as meritless because the discipline was warranted in view of Robinson's failure to comply with a direct management order. Contrary to Robinson's belief, he never grieved his transfer, or for that matter, his termination. In fact, Robinson indicated that he stayed away

from the Union to preserve his mental health after filing the August 1985 grievance protesting his DLO. Thus, we are not persuaded that any Union conduct instigated Robinson's transfer or termination. Robinson has no basis to claim that the Union retaliated against him by failing to pursue nonexistent grievances.

Because Robinson has failed to demonstrate the requisite casual connection essential to a claim of retaliation, we conclude that summary judgment was properly granted to the Union on this issue.

The district court's judgments are AFFIRMED.

APPENDIX "B"

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

No. C-3-84-570

JOE L. ROBINSON, Petitioner,

vs

DAVE QUICK/ZOLA PECK, et al, Respondent

(3-8-88)

DECISION AND ENTRY OVERRULING PLAINTIFF, JOE L. ROBINSON'S MOTION TO OVERTHROW BIAS AND MOTION FOR NEW TRIAL AND EMERGENCY RELIEF (OC #59) AND OVERRULING PLAINTIFF'S AMENDED MOTION TO OVERTHROW BIAS VERDICT OF JURY (DOC. # 61)

This case is before the Court on Plaintiff's Motion to Overthrow Bias Verdict and Motion for New Trial and Emergency Relief (Doc. #59), and Plaintiff's Amended Motion to Overthrow Bias Verdict of Jury (Doc. #61) which request that the court overturn the jury

verdict returned against Plaintiff and in favor of Defendants Dave Quick and Zola Peck on December 2, 1987, vacate the judgment entered in favor of the Defendants on December 2, 1987, and grant Plaintiff a new trial. Those motions were on December 3, 1987.,and December 10, 1987, respectively, pursuant to Rule 59 of the Federal Rules of Civil Procedure.[1] For the reasons set forth below, Plaintiff's motions are overruled.

A brief outline of the history of this action is helpful to the consideration of these Rule 59 (a) motions. This case is an employment discrimination action brought under 42 U.S.C. 1981.[2] Plaintiff acted as his own counsel. Trial

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1. Fed. R. Civ. P. 59 (a) states in pertinent part: A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons

to a jury convened on November 23, 1987. Plaintiff Robinson participated fully in the voir dire and the selection of the jury panel. At no time, either before or during trial did plaintiff Robinson object to the racial composition of the jury panel or the venire. On December 2, 1987, the jury returned a verdict against Plaintiff and in favor of Defendants, concluding that neither Defendant intentionally discriminated against Plaintiff Robinson on thebasis of his race. (Doc. #57).

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for which new trials have heretofore been granted in actions at law in the courts of the United States..."

2. Plaintiff contended that the Defendants ordered him to perform jobs which violated his "code", said code being the instructions of his treating physician as to what types of tasks the Plaintiff should avoid due to his physical impairments. The Plaintiff further contended in his Complaint that white co-workers who have been similarly coded have not been forced by the Defendants to perform tasks which conflict with their medical restrictions.

Plaintiff Robinson bases his Motion for New Trial upon two grounds. First, Plaintiff asserts that the jury's verdict was against the manifest weight of the evidence. Second, Plaintiff asserts that the verdict rendered against Plaintiff was based not upon the evidence upon the record, but upon the racial bias of the jury. The court will consider each of these assertions.

A. The Weight of the Evidence

Plaintiff Robinson first asseets that the jury's verdict in favor of Defendants Quick and Peck was against the weight of the evidence (Doc. #59). After reweighing the evidence presented in this case, however, the Court is unable to conclude either that the verdict was against the weight of the evidence or that it is one which a reasonable jury would not have reached.

The Sixth Circuit has set forth very specific guidelines with regard to the discretion possessed by a trial court in ruling upon a motion for new trial.

> In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence. Felton v. Spiro, 78 F. 576 (6th Cir. 1897) (Taft;), General American Life Ins. Co.v. Central Nat'l Bank,136 F .2d 821 (6th Cir. 1943), and "it is the
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> duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence***." Aetha Cas. & Surety Co. v. Yeatts, in Turner v. United States, 229 F .2d 944,946 (6th Cir.), cert. denied,351 U.S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956)...however, "(c)ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v. Agnew, 202 F .2d 119,211 (6th Cir. 1953). Thus while the district judge has the duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one

which could reasonably have been reached. See Duncan v. Duncan,377 F .2d 49,52, (6th Cir.), cert. denied, Fain v. Duncan, 389 U.S. 913 (1967). See also Bruner v. Dunway, 684 F.2d 422,425 (6th Cir. 1982), cert. denied, Bates v. Bruner, 459 U.S. 1171 (1983); TCP Indus., Inc. v. Uniroyal, Inc. , 661 F 2d 542, 546 (6th Cir. 1981).

This court concludes that the verdict rendered in this case was one which the jury could reasonably have reached. There is ample evidence to the effect that Defendats Quick and Peck attempted to find tasks which Plaintiff Robinson was physically capable of perdorming. Defendants went so far as to allow Plaintiff Robinson's treating physician to review potential positions. Further there was scant evidence in support of Plaintiff's contention that the Defendants were motivated by racial bias.

Based upon the evidence on the record, this Court finds that the verdict rendered by the jury in this case was not against the clear weight of the evidence. Basically, the jury was presented with two conflicting interpretations of the facts and chose to believe that the Plaintiff had not sustained his burden of proof.

B. The Racial Composition of the Jury

The Plaintiff next contends that the verdict rendered by the jury was not based upon the evidence presented at trial but upon the jury's racial bias (Doc.#59, 61). Plaintiff Robinson notes that the members of the jury were all white as were Defendants Quick and Peck, while Plaintiff Robinson is black (Doc. #59). Plaintiff further notes that the jury venire contained "only three or four black (sic)." (Doc. #61)

Since the Plaintiff has presented or proffered no evidence whatsoever indicating any racial bias on the part of the individual jurors, the Court assumes that Plaintiff is objecting to the racial composition of the jury.[3]

Statutory challenges to district court compliance with jury selection procedures are governed by 28 U.S.C. 1867. Section 1867 (c) of Title 28 states in pertinent part:

> in civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefore, which ever is earlier, any party may move to the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(Emphasis added.) "any challenge to the racially motivated systematic exclusion of jurors ~~in~~ the United States District

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3. As a matter of fact, during final arguments, Plaintiff Robinson himself indicated that he had had a fair trial.

Courts must be raised before or during voir dire examination." Trotter v.Todd 719 F .2d 346, 348 n.4 (10th Cir.1983). Thus, the success of any objection to the racial composition of a jury is in part dependent upon the timeliness of the objection. It is important to note that the procedures set forth by 28 U.S.C. 1867 are the "exclusive means by which. ..a party in a civil case may challenge any jury on the grounds that such jury was not selected in conformity with the provisions of this title." See 42 USC 1867 (e) (emphasis added). The Sixth Circuit has ruled that the requirements of 28 U.S.C. 1867 will be strictly enforced. United States v. Young, 570 F .2d 152, 153 (6th Cir. 1978).

This Court concludes that in voicing his objection to the racial composition of the jury, Plaintiff Robinson failed to meet the timeliness

requirements set forth by 1867 (c).[4] Plaintiff raised no objections to the racial composition of the jury on voir dire, nor during theexercise of challenges for cause or peremptory challenges. Objections to the composition of the jury were raised only after a verdict had been returned against the Plaintiff. Accordingly. as Plaintiff failed to meet the requirements of 1867 (c), the Court concludes that Plaintiff's Motions for New Trial based upon a statutory challenge to the racial composition of the jury venire must be overruled.

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4. Plaintiff Robinson also failed to meet one of the requirements of 28 U.S.C. 1867 (d). Section 1867 (d) requires that a motion filed 28 USC 1867 (c) contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply the provisions of this title..." This failure alone is sufficient to bar Plaintiff statutory challenge to the selection of the jury. See, e.g.,

While the effects of a procedural rule such as 28 U.S.C. 1867 might at first glance appear to be unduly harsh, the need for such a rule is readily apparent. The parties in a given action become aware of the racial composition of the jury at the very onset of a trial. It would be grossly unfair to allow a plaintiff or a defendant to await a verdict prior to raising objections to a jury's racial composition. To do so would be to allow the objecting party a second opportunity to win on the merits. Additionally, the Court recognizes that:

> A defendant has no right to a petit jury composed in whole or in part

of persons of his own race. Strauder v. West Virginai, 10 Otto 303, 305, 100 U. S. 303, 305, 25 L. Ed. 664. However, the Equal Protection Clause guarantees

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United States v. Wellington, 754 F.2d 1457, 1468 (9th Cir.)., cert denied, 474 474 U.S. 1032 (1985)

the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.

Batson v. Kentucky , 106 S. Ct. 1712, 1713 (1986).[5] Constitutional challenges to the racial composition of a jury array require the Plaintiff to establish "purposeful discrimination" in the Court's jury selection procedures. See Swain v. Alabama,380 U.S. 202, 203-05 (1965); United States v. Grose, 525 F .2d 1115, 1119 (7th Cir. 1985).

Plaintiff Robinson has neither alleged nor put forth any evidence to the effect that members of his race have not been summoned for jury service over a long period of time" or * were subst-

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5. The Court notes that the Batson case involved the rights of a criminal defendant. The Court is uncertain as to whether the standard for jury selection set forth in Batson is equally applicable to civil juries, but will assume

antially underrepresented on the venire from which the jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination.'" Batson, 106 S. Ct. at 1722 (quoting Whitus V. Georgia, 385 U.S. 545 552 (1967). Plaintiff has failed to establish a prima facie case of discrimination in the selection of his jury venire. Accordingly, the Court concludes that Plaintiff's Motions for New Trial based upon a constitutional challenge to the racial composition of the jury veniee must be overruled.

C. Conclusion

Accordingly, as this Court has determined that the jury's verdict was not against the weight of the evidence and that Plaintiff Robinson's objec-

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arguendo that the standanr does apply to civil juries.

tion with regard to the racial composition of the jury was both untimely and without merit, the Court concludes that Plaintiff's Motions for New Trial must be and hereby are overruled in their entirety.

Finally, the Court observes that even had the jury found Defendant Quick and/or Defendant Peck to be liable to Plaintiff Robinson, the Court could not have ordered Defendant Quick and /or Defendant Peck to provide the equitable remedy of reinstatement. Neither Defendant Quick nor Defendant Peck has the authority necessary to reinstate the Plaintiff. The Court cannot order a defendant to do that which he or she is incapable of doing. Further, as General Motors was not a party to this action, the court could not have ordered General Motors to reinstate Plaintiff

Robinson.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

C

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

C-3-86-456

JOE L. ROBINSON, Petitioner,

vs

LOCAL 696 U.A.W., Respondent

(June 28, 1988)

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOC. #42) AND SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. #40); JUDGMENT TO BE ENTERED FOR DEFENDANT AND AGAINST PLAINTIFF; TERMINATION ENTRY.

In a Decision and Entry dated February 5, 1988, this Court overruled Plaintiff's Motion for Summary Judgment (Doc. #14) and sustained in part and overruled in part defendant's

Motion for Summary Judgment (Doc. #10). The sole remaining issue was Plaintiff's claim of retialiation against the Union. This case is now before the Court on Defendant's and Plaintiff's Cross Motions for Summary Judgment on the retialiation claim (Doc. #40 and #42). For reasons stated briefly below, Defendant's Motion for Summary Judgment is granted and Plaintiff's Motion for Summary Judgment is overruled.

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment is proper weree, construing facts most strongly in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affivadits, if any, show that there is no genuine iss as to any material fact and that the moving party is entitled to a judgment as a matter

of law". Fed. R. Civ. P. 56 (c).

Summary judgment is properly awarded where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The Defendant has properly set forth in its Motion for Summary Judgment the elements Plaintiff must establish for a prima facie case of discriminatory retaliation under Title VII and 42 U.S.C. 1981:

1) Plaintiff was engaged in protected opposition to discrimination.

2) Plaintiff was subject to adverse employment action.

3) There was a casual connection between the protected activity and

the adverse employment action (Doc. #40, pp. 9-10).

There is sworn testimony from which it is possible to infer that Plaintiff was engaged in protected activity in assiting Beulah Booker in a discrimination claim. Robinson Deposition, pp. 90-92.

Plaintiff was subject to adverse employment actions with respect to the loss of work to which he alleges he was entitled (the subject of grievances nos. 734142, 734143, 734144), with respect to the transfer to second shift, and with respect to the cancellation of his seniority and the termination of his employment.

Plaintiff contends that a casual connection may be established through Dorris Duff, who allegedly made remarks on August 7 or 8 which Plaintiff contends show Duff's intent to retia-

iate against Plaintiff, through Duff hostile warning that Plaintiff's activities in assisting employee Beulah booker in her discrimination claim would lead to Plaintiff's losing his job. Robinson Deposition, pp. 34 and 53. Plaintiff believes that Joe Dowling may have also harbored an intent to retaliate. However, Plaintiff concedes that he has no direct evidence that either Dowling's abusive language or other behavior demonstrate an intent to retiate rather than a generally hostile attitude toward Plaintiff. Robinson Deposition, pp. 46 and 50.

With respect to the cancellation of Plaintiff's seniority and the termination of his employment, Plaintiff did not file a grievance. Robinson Deposition, p.59. Since there was no grievance for the Defendant to pursue

there could be no retaliation in the Union's failure to pursue.

The cancellation of seniority and termination of employment were the acts of theemployer through management officials Milton Anderson and Jack Kinderdine, in compliance with the collective bargaining agreement. Transcript of Kinderdine testimony from Robinson v. Quick and Peck, pp 269-274. Plaintiff presents no evidence that Dorris Duff or any other union member participated in these management decisions. Thus even if Duff's remarks are interpreted to demonstrate an intent to retaliate, there is no casual connection between that intent, if it did exist, and the cancellation of seniority and termination of employment.

Plaintiff contends that the cancellation of seniority and

termination of employment were the direct result of the union's failure to remedy the transfer to second shift, which he alleges was in violation of the contract. Robinson Deposition, pp. 73-74. Although Plaintiff alleges that certain union officials favored his being transferred to second shift (Robinson Deposition, p.24, Plaintiff presents no facts which demonstrate that they participated in the decision. The decision was made by management, in accordance with the contract, in light of the facts known to management officials. TR Kinderdine Testimony, pp. 254-265, 283-288.

Plaintiff did file a grievance with the union, through Kent Hawkey, at the time of the transfer, which Plaintiff believed challenged the alleged wrongfulness of the transfer. Robinson Deposition, pp 31, 58, 81. In fact,

however, the grievance addressed only the disciplinary lay-off and not the transfer itself. This was pointed out to Plaintiff, and Plaintiff testified that he had read the grievance and signed it. Robinson Deposition, pp. 57-58. Thus as fas as the transfer was concerned, the union could not retialate by failing to pursue a grievance, because there was no grievance to pursue which addressed the transfer. It is most unfortunate that Plaintiff misunderstood the content of the grievance, but a misunderstanding between Plaintiff and a union member with whom Plaintiff has no quarrell (Robinson Deposition, p. 43) does not demonstrate retialiation.[1]

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1. At this point, the Court must note that because there is no evidence of union involvement in the transfer and termination decisions and because no grievances specifically directed to

With respect to Dorris Duff's failure to pursue the grievance actually filed---that addressing the disciplinary layoff--it is undisputed that an order was given to Plaintiff, thatPlaintiff refused to comply with the order, and that adisciplinary lay-off may be imposed in such circumstances. TR Hawkey Testimony, pp 207-208. If the discipline was properly imposed--and there is no evidence that it was not, even if the management decision to transfer was wrongful---a failure to overturn the discipline or to mount an attempt to overturn the discipline does demonstrate retialation. That is, the factsbefore this court

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those decisions were filed, even if Plaintiff could demonstrate that the Union's failure to pursue the grievances

demonstrate that Plaintiff's conduct in refusing to comply with the order not retialiation by the union, was the cause of the adverse employment action. Plaintiff has testified that the union, through its officials, specifically advised him to comply with the order and then to file a grievance over the transfer. Robinson Deposition, p. 42. thus, rather than causing the adverse employment action, the union gave Plaintiff advice which would have prevented the cancellation of his seniority

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Plaintiff did file was due to retialiation against Plaintiff by the union, Plaintiff could not receive the relief he seeks. That is, this Court could not consider any damages to Plaintiff resulting from the transfer or termination; the court could consider only damages resulting from the loss of a day's work or several hours' work specifically addressed in the four grievances at issue in this case.

and the termination of his employment and might have resulted in a successful challenge to the transfer.

Plaintiff also contends that the union, through Dorris Duff, retialated against Plaintiff by failing to pursue grievances nos. 734142, 734143 and 734144, all of which related to loss of work and seniority rights to overtime. All of these grievances were filed in June, before Duff made the remarks which allegedly demonstrate retialatory intent. Management explanations are provided (see deposition exhibits) and there is sworn testimony that the grievances were investigated and withdrawn as without merit, Duff affidavit, p.1. Plaintiff has presented no facts, through affivadits or the transcripts of the deposition or other testimony, which

would tend to establish that the grievances had merit. Plaintiff has failed to establish a sufficient casual relationship between his p rotected activity and the adverse employment action. That is, the facts presented to this Court fail to demonstrate that union retaliation was the cause of the loss of work or overtime of the failure to obtain compensation for the loss of work or overtime through the grievance process.

This Court concludes that the Plaintiff has "fail(ed) tomake a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial".(Celotex at 322) ---that is, Plaintiff has failed to demonstrate a casual connection between activity

protected under 1981 and /or Title VII and any adverse employment action. Accordingly, summary judgment must be awarded to Defendant and Defendant's Motion therefor is granted. In view of the court's decision that summary judgment must be granted to Defendant, Plaintiff's Motion for Summary Judgment on his claim against the union must, accordingly, be overruled.

Judgment will be entered for the Defendant and against the Plaintiff herein.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division at Dayton.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE